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**BROKEN BORDERS, BROKEN LAWS:
ALIGNING CRIME AND PUNISHMENT
UNDER SECTION 2L1.1(b)(7) OF THE
U.S. SENTENCING GUIDELINES**

*Genevieve Quinn**

Despite the intensifying militarization of the United States' borders, roughly 4,000 undocumented immigrants attempt to cross into the U.S. each day. Increased border security has not stopped the flow; rather, it has diverted migrants' journeys into the most perilous stretches of borderlands and coastlines. In response, migrants increasingly rely on human smugglers to guide them across the border, even in the face of the well-known risks of injury and death. Under section 2L1.1(b)(7) of the U.S. Sentencing Guidelines, defendants convicted of smuggling illegal immigrants are subject to a sentence enhancement for any bodily injury or death that occurs. The Guidelines are silent as to the issue of causation, however. As a result, circuits are split over what causal connection section 2L1.1(b)(7) requires between the defendant's conduct and the resulting harm. This Note discusses the continuing importance of the Guidelines in the post-Booker era, and examines the circuits' differing interpretations of section 2L1.1(b)(7). This Note concludes that a section 2L1.1(b)(7) enhancement is predicated on only a loose causal connection to the defendant's overall criminal conduct. It advocates for an amendment to the Guidelines that would require a section 2L1.1(b)(7) enhancement to be contingent on a finding that the defendant recklessly or intentionally created a serious risk of bodily harm. Further, this Note proposes that, even before the Sentencing Commission enacts a formal amendment, judges should exercise their post-Booker sentencing discretion to require a causal connection that will best achieve the goals of retribution and deterrence.

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INTRODUCTION

In July 2010, the bodies of fifty-seven border crossers were brought into Arizona's Pima County morgue after having been found dead in the deserts around Tucson.¹ Although the number of people attempting to cross the United States-Mexico border illegally has declined in recent years,² the number of unauthorized migrants found dead continues to increase.³ The most common cause of death in border crossing is hyperthermia or "heat

1. James C. McKinley Jr., *An Arizona Morgue Grows Crowded*, N.Y. TIMES, July 29, 2010, at A14.

2. See Jeffrey Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, PEW HISPANIC CTR., i (Sept. 1, 2010), <http://www.pewhispanic.org/files/reports/126.pdf> (reporting that the annual inflow of unauthorized immigrants into the U.S. was almost two-thirds smaller in the 2007 to 2009 period than it had been from 2000 to 2005); see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-770, ILLEGAL IMMIGRATION: BORDER-CROSSING DEATHS HAVE DOUBLED SINCE 1995; BORDER PATROL'S EFFORTS TO PREVENT DEATHS HAVE NOT BEEN FULLY EVALUATED 42, tbl.2 (2006), available at <http://www.gao.gov/new.items/d06770.pdf> (noting the recent decline in the estimated number of illegal entries); TERRY GREENE STERLING, ILLEGAL: LIFE AND DEATH IN ARIZONA'S IMMIGRATION WAR ZONE 18 (2010) (noting the decrease in the number of migrants crossing over Arizona's border); Press Release, Coalición de Derechos Humanos, Final Count for Recovered Bodies on the Arizona-Sonora Border 237 as Border Patrol Continues to Report Decreases in Crossings (Oct. 11, 2007), <http://www.derechoshumanosaz.net/images/pdfs/10-11-07%20press%20release.pdf> (citing statements by Border Patrol claiming a decrease in the number of illegal crossings). For a discussion of how this decline relates to the economic downturn, see *infra* note 10 and accompanying text.

3. See Press Release, Coalición de Derechos Humanos, Arizona Fiscal Year Deaths: 253 (Oct. 21, 2010), <http://nnirr.blogspot.com/2010/10/us-border-security-causes-record.html> ("In 1994, there were 14 known migrant deaths in Arizona Only sixteen years later, [officials] are recovering eighteen times that number in one year. That is a 1,707% increase."); see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 21 (comparing the increasing number of deaths to the decline in the estimated number of illegal entries); Fiona B. Adamson, *Crossing Borders: International Migration and National Security*, 31 INT'L SECURITY 165, 178-79 (2006) ("The number of deaths at the U.S.-Mexican border has steadily increased . . ."); McKinley Jr., *supra* note 1.

death”; but migrants also drown, die of hypothermia, suffer heart attacks, die in traffic accidents, die of snake bites, or become victims of violent crimes.⁴

Despite the U.S.’s escalating militarization of its borders and coastlines,⁵ there continues to be a flow of undocumented immigrants into the U.S.⁶ In fact, heightened border control has lengthened the journeys of unauthorized migrants,⁷ forcing migrants to trek across less guarded—and usually more perilous—stretches of border.⁸ As a result, migrants often depend on smugglers to navigate the terrain.⁹ While the recent economic downturn has slowed the demand for labor, leading to a decrease in the number of people migrating to the U.S.,¹⁰ the demand for human smugglers not only

4. See LUIS ALBERTO URREA, *THE DEVIL’S HIGHWAY* 19 (2004). For a detailed description of the stages of hyperthermia, see *id.* at 120–29.

5. See URREA, *supra* note 4, at 19 (describing the expanding border enforcement, with its “[b]igger fences, floodlights, a Border Patrol truck every half-mile, sensors, infrared spy videos, [and] night vision cameras”); see also *infra* notes 42–43 and accompanying text.

6. See *Good Neighbours Make Fences*, *ECONOMIST*, Oct. 4, 2008, at 25 (“In response to beefed-up border patrol, immigrants have not given up; rather, they now cross through less heavily patrolled areas.”); Yvette De La Garza et al., *Crossing ‘La Linea,’* SIGNONSANDIEGO.COM (Feb. 26, 2003), <http://legacy.signonsandiego.com/news/features/migrant/20030621-9999-border.html> (reporting migrants have reacted to increased Border Patrol presence by shifting their crossing patterns to areas that are less heavily patrolled).

7. See Lynn Stephen, *Expanding the Borderlands: Recent Studies on the U.S.-Mexico Border*, 44 *LATIN AM. RES. REV.* 266, 273 (2009); Joanna B. Swanger, *Labor in the Americas: Surviving in a World of Shifting Boundaries*, 38 *LATIN AM. RES. REV.* 147, 164 (2003).

8. See STERLING, *supra* note 2, at 18; David Spener, *Mexican Migrant-Smuggling: A Cross-Border Cottage Industry*, 5 *J. INT’L MIGRATION & INTEGRATION* 295, 296–97 (2004); see also U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 2, at 6–9 (explaining that since implementation of the “Southwest Border Strategy,” an enforcement campaign “designed . . . to shut down the traditional corridors for the flow of illegal immigration along the southwest border,” there has been “an increase in border-crossing deaths”); Press Release, Coalición de Derechos Humanos, Arizona Recovered Body Count Reaches 199 as the Dept. of Homeland Security Announces Plans to Increase and Expand the Deadly Border Strategy (Aug. 14, 2007), <http://www.derechoshumanosaz.net/images/pdfs/8-14-07%20press%20release.pdf> (“Research-substantiated data indicates that as vigilance is increased in a sector or area, migrants are then pushed into the most isolated, dangerous, and deadly areas, resulting in more injuries and deaths.”).

9. See *Deadly Consequences of Illegal Alien Smuggling: Hearing Before the Subcomm. on Immigration, Border Sec., & Claims of the Comm. on the Judiciary H.R.*, 108th Cong. 55 (2003) (prepared statement of Dan Stein, Executive Director, Federation for American Immigration Reform), available at <http://judiciary.house.gov/legacy/87993.pdf> [hereinafter *Subcomm. on Immigration, Border Sec., & Claims*] (noting that heightened border control “has come to be associated much more with the operations of alien smugglers than in the past”); *id.* at 29 (statement of Maria Jimenez, Chair, Mayor’s Advisory Comm. for the Office of Immigrant and Refugee Affairs, City of Houston, Texas) (stating that smuggling networks “have grown, flourished and consolidated as avenues for legal migration reduced due to changes in law and border enforcement resources and strategies increased”); see also URREA, *supra* note 4, at 60 (“Now, more than ever, walkers need a Coyote.”); Stephen, *supra* note 7, at 273–74 (describing migrants’ increasing reliance on human smugglers).

10. See Editorial, *Border News*, *N.Y. TIMES*, Sept. 4, 2010, at WK7; see also Francisco Alba, *Mexico: A Crucial Crossroads*, *MIGRATIONPOLICY.ORG* (Feb. 2010), <http://www.migrationinformation.org/feature/display.cfm?ID=772> (reporting that as a consequence of the U.S. recession, “33.5 percent fewer Mexicans left Mexico during the

persists but grows stronger.¹¹ As Maria Jimenez, Chair of the Mayor's Advisory Committee for the Office of Immigrant and Refugee Affairs of the City of Houston, Texas, stated at a congressional hearing before the Subcommittee on Immigration, Border Security, and Claims, "[Border] fortification has made necessary the use of smugglers . . . where [ten] years ago persons walked in alone."¹²

In an effort to deter illegal immigration and punish those caught smuggling migrants, federal prosecutors usually frame charges under 8 U.S.C. § 1324, which criminalizes transportation of illegal "[a]liens."¹³ Moreover, prosecutors generally pursue sentence enhancements whenever possible.¹⁴ Section 2L1.1(b)(6) of the U.S. Sentencing Guidelines (Guidelines) provides for a two-level increase if the defendant intentionally or recklessly created a substantial risk of serious bodily injury or death.¹⁵ Further, where an injury or death occurs, prosecutors may petition for an enhancement under section 2L1.1(b)(7) of the Guidelines, which advises courts to increase the base level offense where "any person died or sustained bodily injury . . . according to the seriousness of the injury."¹⁶

In certain cases, sentencing judges do not encounter an interpretive issue in applying a section 2L1.1(b)(7) enhancement. For example, if in trying to evade law enforcement, a defendant orders those he is smuggling out of his boat at gunpoint, causing an immigrant to drown, there is an almost automatic application of the section 2L1.1(b)(7) enhancement.¹⁷ The enhancement process becomes problematic, however, where the link between the defendant's conduct and the resulting harm is more attenuated or altogether absent. Section 2L1.1(b)(7) does not specify whether its application is predicated on a finding that the defendant recklessly or intentionally created a substantial risk of the bodily injury or death that later occurred.¹⁸ Consequently, courts have reached different conclusions, resulting in a circuit split.

Part I of this Note discusses current immigration statistics and trends, as well as the legislative efforts aimed at punishing and deterring illegal

second quarter of 2009 than in the same quarter of 2008 and 61.0 percent fewer than in the same period of 2006"); Passel & Cohn, *supra* note 2, at i.

11. See *Subcomm. on Immigration, Border Sec., & Claims, supra* note 9, at 17 (statement of Tom Homan, Interim Resident Agent in Charge, San Antonio, TX, Bureau of Immigration and Customs Enforcement, Department of Homeland Security) ("Human smuggling has become an international lucrative criminal market in the [U.S.].")

12. *Id.* at 27 (statement of Maria Jimenez).

13. See Donald L. Brown, *Crooked Straits: Maritime Smuggling of Humans from Cuba to the United States*, 33 U. MIAMI INTER-AM. L. REV. 273, 286 (2002).

14. See Michael A. Simons, *Prosecutorial Discretion in the Shadow of Advisory Guidelines and Mandatory Minimums*, 19 TEMP. POL. & CIV. RTS. L. REV. 377, 385–87 (2010).

15. U.S. SENTENCING GUIDELINES MANUAL § 2L1.1(b)(6) (2010) ("If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.").

16. *Id.* § 2L1.1(b)(7).

17. See generally *United States v. Hernandez Coplin*, 24 F.3d 312 (1st Cir. 1994).

18. See U.S.S.G. § 2L1.1(b)(7).

immigration. In particular, it will focus on section 2L1.1 of the Guidelines. Part I also examines the Supreme Court's treatment of the Guidelines, as well as the Guidelines' continued significance, despite their "advisory" status.

Part II discusses the split that has arisen out of the circuits' differing interpretations of section 2L1.1(b)(7). Specifically, Part II examines the circuit split over whether a section 2L1.1(b)(7) enhancement is predicated on a finding that section 2L1.1(b)(6) applies—i.e., whether section 2L1.1(b)(7) applies only where the defendant recklessly or intentionally created a substantial risk of the resulting injury or death.

Finally, Part III resolves the different interpretive issues regarding section 2L1.1(b)(7)'s causation requirement. Part III then advocates for an amendment to the Guideline to require that the defendant recklessly or intentionally exposed the victim to the risk of serious bodily injury or harm. Accordingly, Part III argues that the Sentencing Commission should amend the Guidelines but that, in the interim, courts should utilize their post-*Booker* discretion to impose a more stringent causation standard.

I. FEDERAL SENTENCING IN THE POST-*BOOKER* ERA: THE CONTINUED RELIANCE ON THE GUIDELINES FOR SENTENCING DEFENDANTS CONVICTED OF SMUGGLING ILLEGAL IMMIGRANTS

A. *The Changing Face of Immigration: From Huddled Masses to Desert Sojourners*

Migration is a time-honored phenomenon.¹⁹ Wherever there are disparities between the economic and social conditions of different countries, there are corresponding migration patterns, whether through legal processes or illegal channels.²⁰ The stream of people crossing borders is a reflection of the intensity of globalization.²¹ Today, approximately 180 million people live outside their country of origin, with between 5 and 10 million people migrating across national borders every year.²² At present,

19. See, e.g., Adamson, *supra* note 3, at 168; Press Release, *supra* note 8 (quoting Anna O'Leary of Coalición de Derechos Humanos as stating, "Migration is a natural phenomenon that is part and parcel of the human experience."); *People Smuggling*, INTERPOL, <http://www.interpol.int/Crime-areas/Trafficking-in-human-beings/People-smuggling> (last visited Oct. 20, 2011) ("For centuries, people have left their homes in search of better lives elsewhere.").

20. See David Spener, *Some Critical Reflections on the Migration Industry Concept 2* (May 29, 2009) (paper presented at the Migration in the Pacific Rim Workshop, UCLA); *People Smuggling*, *supra* note 19.

21. See Adamson, *supra* note 3, at 169; see also *Pushing the Border Out on Alien Smuggling: New Tools and Intelligence Initiatives: Hearing Before the Subcomm. on Immigration, Border Sec., & Claims of the Comm. on the Judiciary*, 108th Cong. 19 (2004) (statement of John P. Torres, Deputy Assistant Director, Smuggling and Public Safety, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:93716.pdf ("Human smuggling . . . in persons take[s] place within a complex global environment of political and economic relationships between countries and peoples.").

22. Adamson, *supra* note 3, at 169.

economic instability is regarded as the primary impetus for illegal migration throughout the world.²³

In the U.S. alone, there are an estimated 11.1 million illegal immigrants,²⁴ with roughly 4,000 illegal border crossings each day.²⁵ In particular, “[m]igration between Mexico and the [U.S.] is ‘the largest sustained flow of migrant workers in the contemporary world.’”²⁶ Migration to the U.S. across the U.S.-Mexico border dates back to the late nineteenth century.²⁷ World War II led to an increased demand for labor, which in turn prompted the U.S. to adopt the 1942 “Bracero” program, providing 4.5 million contracts to temporary migrant workers.²⁸ By the time the program ended, these migratory patterns had become deeply embedded in the economic and cultural lives of Mexican communities. Thus migration continued—and continues to this day—despite the fact that it is mostly unauthorized.²⁹

Historically, the majority of undocumented migrants have crossed the U.S. border to work temporarily rather than to settle.³⁰ In fact, most Mexican migrants have returned home after spending an average of only three years in the U.S. in order to earn money to send back to Mexico.³¹

23. See *People Smuggling*, *supra* note 19; see also Alba, *supra* note 10 (explaining that migration to the U.S. is motivated foremost by economic considerations, a point which is inextricably linked to the fact that the nominal wages ratio between the U.S. and Mexico has lingered around 10:1).

24. Passel & Cohen, *supra* note 2, at i.

25. Adamson, *supra* note 3, at 174. For a detailed discussion of migrants crossing the border, see Alba, *supra* note 10 (citing research collected by the University of Pennsylvania’s Mexican Migration Project, which has indicated that by age forty, the majority of men in the communities surveyed had undertaken at least one journey across the border). Mexican migration has become a fixture of both the U.S. and Mexican economies, as migration networks of family, friends, and smugglers “have become one of the most effective means for sustaining Mexico-U.S. migration no matter the enforcement measures in place.” *Id.*

26. *Country Profile: Mexico*, FOCUS MIGRATION 1 (Aug. 2008), available at <http://www.bpb.de/files/J6APIM.pdf> (quoting DOUGLAS S. MASSEY ET AL., *WORLDS IN MOTION: UNDERSTANDING INTERNATIONAL MIGRATION AT THE END OF THE MILLENNIUM* 73 (1998)).

27. See Alba, *supra* note 10.

28. See *Country Profile: Mexico*, *supra* note 26, at 2.

29. See *id.*

30. See Steve Martinot, *Immigration and the Boundary of Whiteness*, 1 RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL PERSP. 17, 24 (2007).

31. *Id.* at 24. However, tighter border enforcement has impeded this migratory pattern, increasing the probability that unauthorized immigrants will settle permanently in the U.S. See Stephen, *supra* note 7, at 273 (noting a difference of 13 percent in the number of U.S. immigrants returning home to Mexico from 1992 to 2000); see also *Shortfalls of the 1986 Immigration Reform Legis.: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., & Int’l Law of the H. Comm. on the Judiciary*, 110th Cong. 7–8 (2007) (testimony of Stephen Pitti, Professor of History and American Studies, Yale University), available at <http://judiciary.house.gov/hearings/April2007/Pitti070419.pdf> [hereinafter *Subcomm. on Immigration, Citizenship, Refugees & Border Sec.*] (arguing that the buildup of Border Patrol and the increasing dangers of crossing have “trapped” many Mexicans inside the U.S., discouraging and even preventing them from crossing back over).

Given the limited opportunities for lawful migration³² and the perilousness of illegal routes, migrants have sought third-party assistance.³³ With increasing frequency, migrants hire smugglers (commonly referred to as “coyotes”³⁴) in order to make the journey into the United States.³⁵ The smuggling industry generates about \$10 billion globally per year,³⁶ as roughly half those migrating illegally interact with smuggling or trafficking networks.³⁷ The average illegal immigrant crossing the U.S.-Mexico border, for example, pays over \$2,000 to smugglers.³⁸ Further, the charge for maritime smuggling reportedly is over \$4,000.³⁹

32. See, e.g., STERLING, *supra* note 2, at xii (“[I]f unmarried adult children of Mexicans with green cards wished to obtain a visa to join their parents in the [U.S.], the average wait time was estimated at 192 years. The other option: Hire a smuggler and risk your life crossing the border.”).

33. See *Subcomm. on Immigration, Citizenship, Refugees & Border Sec.*, *supra* note 31, at 6 (testimony of Stephen Pitti) (describing how heightened border enforcement has pushed migration routes into more treacherous regions, forcing migrants to depend increasingly on smuggling operations); Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 976–77 (2001); *People Smuggling*, *supra* note 19 (“Due to more restrictive immigration policies in destination countries and improved technology to monitor border crossings, willing illegal migrants rely increasingly on the help of organized people smugglers.”).

34. See, e.g., Wayne A. Cornelius, *Death at the Border: Efficacy and Unintended Consequences of US Immigration Control Policies*, 27 POPULATION & DEV. REV. 661, 668 (2001) (explaining that the term “coyote” is used to describe “professional people-smugglers who guide migrants across the border”). Human smugglers are also often referred to as “polleros,” which is Spanish for chicken herders; this phrase comes from the derogatory term, “pollo,” or chicken, which some smugglers use to refer to migrants. See STERLING, *supra* note 2, at 39. For an illuminating discussion of the difference between more traditional coyotes and the larger rings of organized smugglers, see Spener, *supra* note 8, at 295.

35. See STERLING, *supra* note 2, at 22 (citing a study that found that four out of every five migrants now use a smuggler); Bryan Roberts et al., *An Analysis of Migrant Smuggling Costs Along the Southwest Border* 6 (Nov. 2010) (Office of Immigration Statistics, working paper), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-smuggling-wp.pdf> (explaining that the demand for smugglers principally is driven by the need “to access the expertise, knowledge, equipment, and other assets of smugglers”). In a recent study surveying migrants from towns in the states of Oaxaca and Yucatan, researchers found that between 92 percent and 98 percent of those who attempted to enter the U.S. made it through, with roughly 80 percent of those surveyed depending on coyotes to guide them. See Stephen, *supra* note 7, at 273–74.

36. Adamson, *supra* note 3, at 174. “This is an instance in which market-based mechanisms take over when the demand for opportunities to immigrate outstrips the supply provided by official channels in the state migration policies.” *Id.* at 193. Indeed, smuggling networks that promise a safe crossing into the U.S. have become billion dollar industries. See *Subcomm. on Immigration, Citizenship, Refugees & Border Sec.*, *supra* note 31, at 6 (testimony of Stephen Pitti).

37. Adamson, *supra* note 3, at 174.

38. See STERLING, *supra* note 2, at 22 (detailing the fact that the typical cost per migrant has risen to \$2,000 or more); Stephen, *supra* note 7, at 273–74 (“[A]verage cost of passage between 2005 and 2007 was \$2,124, with [smugglers] charging \$3,500 and up for passage through a legal port of entry.”); see also *Alien Smuggling*, U.S. IMMIGRATION SUPPORT, <http://www.usimmigrationsupport.org/alien-smuggling.html> (last visited Oct. 20, 2011) (reporting that migrants crossing the U.S.-Mexico border generally “pay anywhere from \$1,500 to \$3,500”).

39. See Randal C. Archibold, *As U.S. Tightens Mexico Border, Smugglers Are Taking to the Sea*, N.Y. TIMES, July 18, 2009, at A11; see also *New Immigration Frontier: The Sea*,

In response to these efforts to circumvent the legal limitations on migration, the U.S. has augmented the policing of its borders,⁴⁰ with a specific focus on the U.S.-Mexico border.⁴¹ In particular, the government has militarized the border,⁴² erecting fences and implementing detection systems that employ a spectrum of devices, many of which have otherwise been reserved for combat and war.⁴³ But despite the intensification of border control efforts, attempts to curb migrant smuggling have been mostly ineffective;⁴⁴ organized criminal networks and smuggling operations continue to find ways to evade these controls.⁴⁵

HOMELAND SEC. NEWSWIRE (Aug. 27, 2010) (reporting that smugglers traveling by sea charge “up to \$5,000 a person”).

40. See *Immigration and U.S. Immigration Policy: Medium-Term Fiscal Impacts and Long-Term Fiscal Sustainability for the U.S. Budget: Hearing Before the Nat’l Comm’n on Fiscal Responsibility & Reform*, 111th Cong. 4 (2010) (testimony of Marc R. Rosenblum, Senior Policy Analyst, Migration Policy Institute), available at <http://www.migrationpolicy.org/pubs/RosenblumtestimonyDeficitCommission-June2010.pdf> (reporting that the U.S. has increased spending on migration enforcement from \$1 billion in 1990 to over \$15 billion in 2009); see also Adamson, *supra* note 3, at 178–79.

41. See Josiah McC. Heyman, *Trust, Privilege, and Discretion in the Governance of the US Borderlands with Mexico*, 24 CANADIAN J. L. & SOC’Y 367, 372 (2009). This border is policed by the U.S. Border Patrol, which is commonly referred to in Spanish-speaking communities as “La Migra.” See STERLING, *supra* note 2, at 9.

42. See STERLING, *supra* note 2, at xiii (reporting that the Border Patrol employed more than 19,000 agents in 2010, over three times the number of agents in 1996); Heyman, *supra* note 41, at 373 (“[T]he US side of the US-Mexico border forms a strip, from the international boundary to between 20 and 100 miles north, of distinctly intense immigration and drug law enforcement.”); see also Stephen, *supra* note 7, at 272 (discussing the proposed 700-mile fence, as well as the use of infrared sensors and unmanned aircrafts); Michael Park, *Mexican Immigrants Trying to Cross the Great Divide*, INDEP. (Sept. 3, 2006), <http://www.independent.co.uk/news/world/americas/mexican-immigrants-trying-to-cross-the-great-divide-414161.html> (describing the hundreds of underground sensors, vehicle patrols, and unmanned drones); David Spener, *Peril on the Migrant Trail—Immigrants Face Death, Danger to Reach U.S.*, SAN ANTONIO EXPRESS-NEWS, June 8, 2003, at 1H (discussing use of new mobile truck scanning system). The government’s enforcement strategy was aimed at preventing entry through the traditional, urban channels, assuming that the geography of the more rural areas would deter crossing. See Cornelius, *supra* note 34, at 667, 675–76 (2001). But see *infra* notes 44–45, 48 and accompanying text for a discussion of how this strategy largely has failed.

43. See Cornelius, *supra* note 34, at 663 (listing examples of increased enforcement strategies, such as “high-intensity, stadium-type lighting,” “steel fencing,” “permanently mounted and mobile infrared night scopes . . . which detect migrants by their body heat,” motion detectors buried underground, and video surveillance systems linked to the underground sensors).

44. See Gallagher, *supra* note 33, at 977. For a more critical analysis of U.S. border control and its relation to U.S.-Mexican foreign policy, see Swanger, *supra* note 7, at 163–65 (“Not only have the instrumental goals of border control (deterring undocumented immigration) not been achieved, but the net effect of America’s self-contradictory policies has been to promote rather than restrict Mexican immigration . . . under circumstances that exacerbate the negative consequences for both nations.” (quoting DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 104 (2002))).

45. See Adamson, *supra* note 3, at 178; see also De La Garza et al., *supra* note 6, at 7 (quoting Manuel Vasquez III, a member of the Department of Homeland Security’s Border, Patrol Search, Trauma, and Rescue team: “No matter how you push them, they’re still going to come, whether they move further east or further west.”).

Moreover, the increased risks associated with crossing have led to a corresponding rise in the fees smugglers charge.⁴⁶ In other words, “[h]igher enforcement means higher risk of capture,” which in turn means that smugglers demand compensation for the increased risk of arrest.⁴⁷ Strengthened border enforcement has not stopped the flow of illegal migration; rather, it has diverted it into more remote—and more dangerous—channels.⁴⁸ Migrants cross in areas that are less patrolled, with the hope that this will reduce the chances of being caught.⁴⁹ They do so despite the increased risk that they will face injury or death on remote trails through the mountains, rivers, and deserts.⁵⁰

The consequences are stark: between 1995 and 2006, there were over 3,700 known fatalities⁵¹ due to illegal border crossings;⁵² and between

46. See Cornelius, *supra* note 34, at 667–68 (reporting that coyote fees “have doubled, tripled, or even quadrupled”); FOCUS MIGRATION, *supra* note 26, at 4 (reporting that coyote fees have increased from earlier rates of several hundred dollars to up to \$2,500 in some cases); Roberts et al., *supra* note 35, at 4 (“All sources show significant positive upward trends in inflation-adjusted smuggling cost since 1993.”).

47. See Roberts et al., *supra* note 35 at 8; see also Cornelius, *supra* note 34, at 668 (concluding that the increase in rates is due to the increase in risks smugglers must assume); David Spener, *You Can Cross Any Time You Want*, in CLANDESTINE CROSSINGS: THE STORIES 1, 9 (David Spener ed. Aug. 11, 2010), <http://www.trinity.edu/dspener/clandestinecrossings/stories/easy%20to%20cross.pdf> (explaining that coyote fees have risen so sharply “because of the greater risk of arrest and lengthy imprisonment that coyotes [are] facing”).

48. See STERLING, *supra* note 2, at 9 (“[R]amped-up enforcement at the border has forced the travelers to abandon the natural corridors”); McKinley Jr., *supra* note 1 (quoting Kat Rodriguez, a spokeswoman for Coalición de Derechos Humanos: “The more that you militarize the border, the more you push the migrant flows into more isolated and desolate areas, and people hurt or injured are just left behind.”); see also Subcomm. on Immigration, Border Sec., & Claims, *supra* note 9, at 8 (statement of Rep. Sánchez) (“Clamping down on the borders is likely to lead to even more desperation.”); *id.* at 6 (statement of Rep. Flake) (arguing that Congress has not “actually stopped anybody . . . that really wants to get here”; rather, Congress has only “made it more difficult”).

49. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-01-842, INS’ SOUTHWEST BORDER STRATEGY: RESOURCE AND IMPACT ISSUES REMAIN AFTER SEVEN YEARS 3 (2001) (“[R]ather than being deterred from attempting illegal entry, many aliens have instead risked injury and death by trying to cross mountains, deserts, and rivers.”); STERLING, *supra* note 2, at xiii (“[Migrants] must navigate ever more treacherous trails slicing through . . . searing creosote flats . . . [and] mountains littered with human bones, smugglers, kidnappers, Minutemen, and Border Patrol agents.”).

50. See McKinley Jr., *supra* note 1; see also Subcomm. on Immigration, Border Sec., & Claims, *supra* note 9, at 7 (statement of Rep. Sánchez) (“[I]t should not be surprising that some people, unable to enter [the U.S.] legally, are willing to take great risks and find another way to enter.”).

51. It is important to note that these are *known* fatalities: “The available data understate the actual number of fatalities, since they reflect only migrants whose bodies [are] recovered by the Border Patrol [U]nknown numbers of additional bodies lie undiscovered in the mountains and deserts.” Cornelius, *supra* note 34, at 669; see Press Release, *supra* note 3 (“It is unknown how many remains are currently near the border but have not yet been discovered, and it is probable that some of these remains will never be recovered.”). Groups that track incidents of border crossing deaths agree that a border crossing fatality “involves a migrant who dies in the course of attempting to cross illegally into the United States.” See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 2, at 11–12. But groups may use different criteria, thereby producing statistics that vary somewhat. See *id.* at 12. For example, the Pima County, Arizona, medical examiner’s office gathers information about where the body

January 1, 2010 and July 28, 2010, more than 150 suspected illegal immigrants were found dead (well above the 107 that were discovered during the same period in each of the two previous years).⁵³ In response, both the U.S. and Mexican governments have created campaigns aimed at warning migrants of dangers.⁵⁴ For example, the U.S.'s Border Safety Initiative (BSI) has taken preventative efforts such as broadcasting announcements in Mexico about the risks and posting signs to warn would-be crossers.⁵⁵ But neither the tightened border enforcement, nor the BSI, nor the climbing death rates, has had a significant deterrent effect.⁵⁶

In fact, researchers have found that individuals who know someone who died while crossing the border are substantially more likely to risk crossing themselves.⁵⁷ In other words, even awareness of the risk of death does not deter entry; perception of risk has "no statistically significant effect" on the decision to cross.⁵⁸

Despite the palpable dangers, illegal immigrants continue to attempt harrowing journeys.⁵⁹ As Maryada Vallet, a humanitarian volunteer with

was found, as well as other evidence such as clothing or personal belongings, to determine whether a recovered body likely constitutes a border crossing death. *See id.* Additionally, the office records all cases of migrant deaths, even those cases of migrants who die of natural causes (e.g., a heart attack or appendicitis). *See id.* Despite the various identification tactics, "the nature of desert death is such that forensic evidence is quickly obliterated. The body mummifies. In one of the million ironies of the desert, those who die of thirst become waterproof. Their fingers turn to stiff leather, and the prints are unreadable." URREA, *supra* note 4, at 37.

52. Stephen, *supra* note 7, at 273 & n.10 (explaining that the most common causes of migrant deaths are dehydration and hypothermia); *see* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 11 (noting that the Border Safety Initiative began formally tracking data on migrant deaths in 2000, but before and since, a number of other groups have aimed to record incidents of border crossing deaths). *But see* Stephen, *supra* note 7, at 273 n.10 (explaining that his "own research on the disappeared—those who cross the border and never appear dead or alive—suggests that these numbers are likely even higher").

53. McKinley Jr., *supra* note 1.

54. *See Subcomm. on Immigration, Border Sec., & Claims, supra* note 9, at 24 (prepared statement of Peter K. Nuñez, Former U.S. Attorney, San Diego, California).

55. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 2, at 10–11 (describing the BSI's goals of educating and informing migrants of the dangers of crossing).

56. *See* Stephen, *supra* note 7, at 272; *see also Subcomm. on Immigration, Border Sec., & Claims, supra* note 9, at 24 (prepared statement of Peter K. Nuñez) (acknowledging the efforts of U.S. and Mexican government agencies aimed at warning migrants of the dangers of crossing, but concluding that "[n]otwithstanding these efforts, deaths have continued to occur").

57. *See* Stephen, *supra* note 7, at 273; *see also Subcomm. on Immigration, Border Sec., & Claims, supra* note 9, at 27 (statement of Maria Jimenez) (arguing that "immigrant communities . . . are very well aware of the risks of crossing the border," but that "from the immigrant perspective, these types of enterprises are a necessary evil given the limited options of crossing legally into the [U.S.]").

58. Doris Meissner & Donald Kerwin, *DHS and Immigration: Taking Stock and Correcting Course*, MIGRATION POLICY INST., 17–18 (Feb. 2009), http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf.

59. *See Subcomm. on Immigration, Border Sec., & Claims, supra* note 9, at 2 (statement of Rep. Hostettler, Chair, Subcomm. on Immigration, Border Sec., & Claims, Comm. on the Judiciary) (noting that despite warnings of the dangers, migrants continue to cross through more remote terrain, and they do so in spite of "signs warning of the heat, lack of water, desolation, great distances and dangerous animals"); *id.* at 6 (statement of Rep. Flake) ("The

No More Deaths,⁶⁰ explains: “The people found dying in the desert have probably tried a few times already and they are going to keep trying in worse and worse physical condition because they feel they have no choice The majority of the people we see here will try again”⁶¹

B. The Continuing Power of the Guidelines in a Post-Booker World

1. General History of the Guidelines

Congress passed the Sentencing Reform Act of 1984 in order to establish a Sentencing Commission that would develop guidelines promoting the fundamental goals of criminal punishment.⁶² Congress’s primary objective was “to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system.”⁶³ The Sentencing Commission pursues this goal by using empirical data to determine sentencing guidelines,⁶⁴ a process which the Commission believes will achieve the most honest, uniform, and proportional sentences.⁶⁵

In formulating the Guidelines, the Commission must satisfy 18 U.S.C. § 3553’s sentencing objectives⁶⁶: (1) retribution and respect for the law, (2) deterrence of future criminal conduct, (3) incapacitation, and (4)

market forces are just too strong to resist. I believe that many of the aliens that are coming across know the risks quite well, and they are still willing to take them, that is how strong the pull is.”); STERLING, *supra* note 2, at 20 (noting that, while immigrants are cognizant of the dangers inherent in crossing, they continue to attempt the journey: “And if they don’t make it, they return . . . to prepare for another trip.”).

60. In order to assist more effectively those crossing in increasingly dangerous and isolated areas, No More Deaths, a non-profit organization, has maintained a summer base in the desert for the past few years, located in Arizona border areas where several bodies have been recovered. *See* Park, *supra* note 42.

61. *Id.*

62. *See* 28 U.S.C. § 994 (2006); U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2010). The Sentencing Commission is an independent agency that operates within the judicial branch. *See An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM’N 1, 3, available at http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf. The President appoints the seven voting members of the Commission, who must then be confirmed by the Senate. *See id.* at 3. A minimum of three members must be federal judges, but no more than four may be members of the same political party. *See id.* They serve six-year terms. *See id.* Additionally, the Attorney General and the chair of the U.S. Parole Commission are ex officio members. *See id.* Operating under these voting members is a staff of approximately 100 employees who are divided into five offices (General Counsel, Education and Sentencing Practice, Research and Data, Legislative and Public Affairs, and Administration), with the staff director of each office reporting to the chair of the Commission. *See id.*

63. U.S.S.G. § 1A1.3.

64. *See id.*; *see also* Daniel M. Levy, Note, *Defending DeMaree: The Ex Post Facto Clause’s Lack of Control over the Federal Sentencing Guidelines After Booker*, 77 FORDHAM L. REV. 2623, 2632 (2009).

65. *See* U.S.S.G. § 1A1.3.

66. *See* 28 U.S.C. § 994.

rehabilitation.⁶⁷ The Commission aims to deal with “both the practical and philosophical problems of developing a coherent sentencing system.”⁶⁸

To solve the practical problems of sentencing, the Guidelines organize crimes into categories that are assigned a base level.⁶⁹ The sentencing court begins with the specific base level assigned to the offense,⁷⁰ adjusting the level according to aggravating or mitigating factors,⁷¹ in order to arrive at the final offense level for the particular defendant.⁷² As the Guidelines instruct in the “General Application Principles,” the sentencing court must apply the specific offense characteristics in the order in which they are listed.⁷³ In addition, the court must consult and apply appropriate cross-references or special instructions in the commentary.⁷⁴ But while this provision directs the order in which the specific offense characteristics are to be applied, there is no rule that an enhancement under one subsection is dependent on application of the preceding enhancements.⁷⁵ Rather, the requirement is numerical; certain provisions require the court to add a number of levels or increase to a particular level, depending upon which value is higher.⁷⁶ After properly calculating the base level, the court refers

67. See 18 U.S.C. § 3553(a)(2) (2006); Levy, *supra* note 64, at 2631.

68. Nicole Black, Note, *United States v. Nacchio and the Implication of an Emerging Circuit Split: Practical and Policy Considerations of Amending Financial Gain as a Measure of Culpability*, 87 DENV. U. L. REV. 633, 637 (2010) (quoting U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008)).

69. See U.S.S.G. § 1A1.3 (2010).

70. See *id.* § 1B1.1(a)(2).

71. See *id.* (using the term “specific offense characteristics” to refer to the particular aggravating or mitigating factors).

72. See *id.*

73. See *id.*

74. See *id.* (“[A]pply any appropriate . . . cross references[] and special instructions contained in the particular guideline.”); see also *id.* § 1B1.7 (explaining that the commentary “may interpret the guideline or explain how it is to be applied”). “[C]ommentary is to be treated as the legal equivalent of a policy statement.” See *id.* “[C]ommentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” *Stinson v. United States*, 508 U.S. 36, 38 (1993). While *Stinson*’s holding that the commentary is “authoritative” was based on the pre-*Booker* notion that the Guidelines were mandatory, *Booker* did not change *Stinson*’s holding regarding the authoritative force of the Guidelines’ commentary.

75. See, e.g., *United States v. Ortiz*, 621 F.3d 82, 84 (2d Cir. 2010) (affirming sentence enhancement under § 2K2.1(b)(4) without applying the preceding § 2K2.1(b)(3) enhancement). The court in *United States v. Green*, 426 F.3d 64, 67 (1st Cir. 2005), for example, affirmed an application of a sentence enhancement under section 2D1.1 for maintaining “stash houses,” without any consideration as to whether the preceding offense characteristics—such as threat to use violence, or distribution in prison, or distribution of an anabolic steroid to an athlete—applied. See U.S.S.G. § 2D1.1(b); see also *id.* § 1B1.1(b) (providing no instructions—express or implicit—to indicate that latter enhancements are dependent upon a finding of the specific offense characteristic enhancements that precede it).

76. See, e.g., U.S.S.G. § 2L1.1(b)(5)(A) (“[I]ncrease by 6 levels, but if the resulting offense level is less than level 22, increase to level 22.”).

to the sentencing table,⁷⁷ which provides a range of punishment according to the defendant's criminal history and offense level.⁷⁸

When interpreting the Guidelines, courts must apply the fundamental rules of statutory construction.⁷⁹ Accordingly, courts give the language of the Guidelines its plain, ordinary meaning, unless otherwise specified.⁸⁰ Moreover, where one section contains particular language that is omitted in another section of the same Guideline, it is generally presumed that this omission was intentional and purposeful.⁸¹

The Commission's empirical approach also aims to deal with the broader philosophical problems implicit in any sentencing scheme.⁸² The Guidelines are founded upon an empirical analysis that, the Commission believes, reflects the theories of both retribution and deterrence without choosing one at the expense of the other.⁸³ Yet, in establishing the Sentencing Commission, Congress appreciated the evolving nature of criminal law. Congress recognized that justice, in the context of criminal sentencing, would not be achieved by a system that was impervious to the changing realities of society.⁸⁴ Instead, Congress conceived of the Commission's work as ongoing.⁸⁵ Accordingly, "the Sentencing Commission remains in place, writing Guidelines, collecting information

77. *See id.* § 5A. The Guidelines' sentencing table contains a total of forty-three levels of offenses and six zones of criminal history. *See id.* The recommended sentences are listed in terms of months of imprisonment, and the Guidelines range from terms of zero-to-six-months, to terms of life. *See id.*

78. *See id.* § 1A1.2 (explaining that the Guidelines prescribe sentencing ranges for those convicted defendants by coordinating the defendant's offense behavior category with his offender characteristic category).

79. *See* *United States v. Bahhur*, 200 F.3d 917, 927 (6th Cir. 2000) ("In determining the manner in which to apply [the Guidelines], we utilize the basic rules of statutory construction"); *accord* *United States v. Dowl*, 619 F.3d 494, 504 (5th Cir. 2010); *United States v. Nacchio* 573 F.3d 1062, 1066 (10th Cir. 2009); *United States v. Perez*, 366 F.3d 1178, 1182 (11th Cir. 2004); *United States v. Mitchell*, 353 F.3d 552, 556 (7th Cir. 2003); *United States v. Mullings*, 330 F.3d 123, 124–25 (2d Cir. 2003); *United States v. Gonzalez*, 262 F.3d 867, 869 (9th Cir. 2001).

80. *See* *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (holding that, when interpreting a statute, words must be given their "ordinary or natural meaning" (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993))).

81. *See* *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

82. *See* Black, *supra* note 68, at 637.

83. *See id.* at 657 ("Though traditional theorists would argue that retribution and deterrence theories may be mutually exclusive, the Sentencing Commission has stated that the Sentencing Guidelines execute both, and that the choice between retribution and deterrence 'was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.'" (quoting U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2008))).

84. *See* U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2010).

85. *See id.*

about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly.”⁸⁶

2. The Continued Importance of the Guidelines in Post-*Booker* Courts

In *United States v. Booker*,⁸⁷ the Supreme Court struck down the mandatory system of Guidelines, thereby rendering the Guidelines advisory in nature.⁸⁸ The *Booker* Court held that the imposition of a sentence outside of the statutory range, where it is based on facts not found by a jury or admitted by the defendant, violates the Sixth Amendment.⁸⁹ The Court found that the mandatory nature of the Guidelines violated a defendant’s constitutional rights,⁹⁰ but concluded that a system of *advisory* guidelines does not violate the Sixth Amendment,⁹¹ because the Court has “never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”⁹²

But while the Guidelines are no longer technically compulsory, simply “announcing that the Guidelines are advisory *does not make them so*.”⁹³ Indeed, the Court’s decisions in subsequent cases have ensured the continuing significance of the Guidelines in the sentencing process.⁹⁴ In *Rita v. United States*,⁹⁵ the Court held that an appellate court may apply a presumption of reasonableness to a sentence imposed by a district court where the sentence falls within the Guidelines’ range.⁹⁶ Moreover, in *Gall v. United States*,⁹⁷ the Court ruled that “the Guidelines should be the starting point and the initial benchmark” in a district court’s calculation of the appropriate sentence.⁹⁸

86. *United States v. Booker*, 543 U.S. 220, 264 (2005). Specifically, the Commission publishes its proposed amendments to the Guidelines in the Federal Register and holds hearings to gather feedback. *See* 28 U.S.C. § 994(x) (2006). After considering comments from members of the federal criminal justice system (e.g., courts, probation officers, the Bureau of Prisons, the Department of Justice, defense attorneys, and public defenders) and collecting data from district courts and other sources, the Commission then revises the Guidelines accordingly. *See id.* § 994(o). Finally, the Commission’s amendments remain subject to congressional review. *See id.* § 994(p).

87. 543 U.S. 220.

88. *See id.* at 226.

89. *See id.* at 232.

90. *See id.* at 226–27.

91. *See id.* at 233.

92. *Id.* Thus, as long as a sentence is within the statutory range, facts affecting the sentence do not have to be found by a jury beyond a reasonable doubt. *See id.* Rather, the sentencing judge need only find facts by a preponderance of the evidence. *See United States v. Armstead*, 552 F.3d 769, 776 (9th Cir. 2008); *United States v. Gomez-Cortez*, No. 01-40512, 2002 WL 496419, at *4 (5th Cir. Mar. 22, 2002) (“A preponderance of the evidence is all that is required to show the existence of a disputed sentencing factor.”).

93. Nancy Gertner, *What Yogi Berra Teaches About Post-Booker Sentencing*, 115 YALE L.J. POCKET PART 137, 137 (2006).

94. *See* U.S. SENTENCING COMM’N, *supra* note 62, at 2.

95. 551 U.S. 338 (2007).

96. *See id.* at 347.

97. 552 U.S. 38 (2007).

98. *See id.* at 49.

In *United States v. Kimbrough*,⁹⁹ the Court acknowledged a policy problem with the Commission's sentencing range for crack cocaine.¹⁰⁰ As a result, the Court gave sentencing courts more leeway,¹⁰¹ concluding that a sentencing judge may choose to disregard the Guidelines based on policy disagreements.¹⁰² But the Court still held that a sentencing judge must assess the Guidelines in its consideration of a sentence.¹⁰³ Furthermore, the *Kimbrough* Court emphasized the "key role" of the Sentencing Commission,¹⁰⁴ which is able to "base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise."¹⁰⁵

In light of *Booker* and its progeny, the Court has made very clear the requirement that district courts begin the sentencing process with a proper calculation and consideration of the Guidelines.¹⁰⁶ While the sentencing court is no longer bound to apply the sentence determined by the Guidelines, it is required to calculate the sentence that the Guidelines recommend.¹⁰⁷ Therefore, misapplication of the Guidelines—due to, for example, misinterpretation of a provision—can be reversible error.¹⁰⁸

Moreover, even without the Supreme Court's continued emphasis on the Guidelines, the Guidelines were likely to influence post-*Booker* sentencing decisions through the cognitive process of "anchoring," a mechanism that simplifies complex tasks by using numeric judgments to establish a starting point (the "anchor"), which is then adjusted up or down.¹⁰⁹ The Guidelines effectively contain over 300 pages of "ready-made anchors."¹¹⁰ Anchors are very important in that they correlate highly with ultimate judgments.¹¹¹ Consequently, judgments continue to be anchored in—and biased toward—the sentencing ranges that the Guidelines provide.¹¹² Therefore,

99. 552 U.S. 85 (2007).

100. *See id.* at 106.

101. *See* Alan Ellis & James H. Feldman, Jr., *Supreme Court Finally Fulfills Promise of Booker*, 23 CRIM. JUST. 47, 48 (2008).

102. *See Kimbrough*, 552 U.S. at 101; *see also* Alyssa L. Beaver, Note, *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2553 (2010) (discussing the Court's decision to allow a sentencing judge "to disregard the Guidelines based upon an ideological disagreement").

103. *See Kimbrough*, 552 U.S. at 91.

104. *Id.* at 108.

105. *Id.* at 109 (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

106. *See Gall v. United States*, 552 U.S. 38, 49 (2007); Jelani Jefferson Exum, *Why March to a Uniform Beat? Adding Honesty and Proportionality to the Tune of Federal Sentencing*, 15 TEX. J. ON C.L. & C.R. 141, 152 (2010).

107. *See Gall*, 552 U.S. at 51 (concluding that an appellate court must review the district court's sentence to ensure that it "committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range").

108. *See id.*; *see also United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) (remanding for resentencing based on the district court's failure to calculate properly the Guidelines range).

109. *See* Gertner, *supra* note 93, at 138.

110. *Id.*

111. *See id.*

112. *See id.*

“[a]dvisory or not, ‘compliance’ with the Guidelines [continues to be] high.”¹¹³

C. The History of 8 U.S.C. § 1324 and Its Corresponding Section 2L1.1 of the Guidelines

1. Legislative History of 8 U.S.C. § 1324

The U.S. government typically prosecutes defendants charged with smuggling unauthorized immigrants¹¹⁴ under 8 U.S.C. § 1324, which criminalizes the act of bringing illegal immigrants into the United States.¹¹⁵ Section 1324 makes it a crime to bring or attempt to bring an “alien” into the United States (or encourage or induce an “alien” to come to the U.S.), knowing or in reckless disregard of the fact that the person is an “alien.”¹¹⁶ Section 1324 also makes it a crime to transport, move, conceal, or harbor illegal immigrants within the U.S.¹¹⁷ Additionally, Section 1324 criminalizes any conspiracy to commit these acts.¹¹⁸

There have been numerous amendments to 8 U.S.C. § 1324,¹¹⁹ but two of the most significant reforms have been the Immigration Reform and

113. *Id.* at 140; see Levy, *supra* note 64, at 2645.

114. See the Migration Policy Institute’s report, *DHS and Immigration: Taking Stock and Correcting Course*, for a discussion of the ICE’s strategies for judicial enforcement: “Like any other law enforcement agency, ICE cannot ensure total compliance with the laws it enforces. It must assess the meaningful differences in culpability and equities among . . . [those] who have violated immigration or customs laws.” Meissner & Kerwin, *supra* note 58, at 25.

115. 8 U.S.C. § 1324 makes it a crime for:

(1)(A) Any person who—(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien; (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law; (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or (v)(I) engages in any conspiracy to commit any of [these] acts, or (II) aids or abets the commission of any of the preceding acts.

8 U.S.C. § 1324 (2006).

116. *Id.*

117. *Id.*

118. *Id.*

119. See *id.* § 1324 (history); see also THOMAS W. HUTCHISON ET AL., FEDERAL SENTENCING LAW AND PRACTICE § 2L1.1 (2009) (noting that § 1324 has been amended eleven times since the Guidelines took effect on November 1, 1987).

Control Act of 1986¹²⁰ (IRCA), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996¹²¹ (IIRIRA). As the Ninth Circuit explained in *United States v. Angwin*,¹²² “[b]oth IRCA and IIRIRA were designed to increase penalties for those who bring aliens to the United States for commercial purposes.”¹²³

Section 1324 also provides an increased maximum sentence for a violation that causes serious bodily injury,¹²⁴ as well as an even higher increased maximum sentence for a violation that results in the death of any person.¹²⁵ Specifically, section 1324(a)(1)(B)(iii) addresses sentencing for a defendant convicted of a violation in which an individual experiences serious bodily injury. It provides that the defendant shall “be fined under Title 18, imprisoned not more than 20 years, or both,” where there is a violation “during and in relation to which the [defendant] *causes* serious bodily injury . . . to, or places in jeopardy the life of . . . any person[.]”¹²⁶ Thus, the statutory language makes clear that the defendant must cause serious bodily injury in order to be found guilty of violating this subpart of the statute. And while § 1324(a)(1)(B)(iii) uses the phrase “resulting in the death of any person,” courts interpret the “resulting in death” terminology as requiring proof of causation.¹²⁷

120. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.).

121. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

122. 271 F.3d 786 (9th Cir. 2001).

123. *Id.* at 803–04 (“Congress enacted IRCA to make it clear that Congress regarded smuggling performed for commercial gain as particularly worthy of punishment,” and the legislative history of IIRIRA reveals that part of its language “was designed ‘to specify criminal penalties for those who engage in a conspiracy to violate alien smuggling, inducement, harboring, and transportation prohibitions, and for those who aid and abet such crimes.’” (quoting H.R. Rep. No. 104-828 (1996))). Despite the apparent legislative emphasis on punishing those who engage in smuggling for financial gain, the statute criminalizes smuggling whether or not it is done for profit (though the maximum sentence for a defendant who violates the statute for profit is, indeed, higher). *See* 8 U.S.C. § 1324(a)(2)(B)(ii). This definition is at odds with others espoused by the international community. *See* Gallagher, *supra* note 33, at 996 (explaining that the UN includes as an element of the crime of smuggling that it is committed “in order to obtain, directly or indirectly, a financial or other material benefit”).

124. *See* 8 U.S.C. § 1324(a)(1)(B)(iii) (providing that a person convicted of violating § 1324 “during and in relation to which the person causes serious bodily injury . . . to, or places in jeopardy the life of, any person, be fined under Title 18, imprisoned not more than 20 years, or both”).

125. *See* 8 U.S.C. § 1324(a)(1)(B)(iv) (providing that a person convicted of violating § 1324 “resulting in the death of any person,” shall “be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both”).

126. 8 U.S.C. § 1324(a)(1)(B)(iii) (emphasis added).

127. *See, e.g., United States v. Pineda-Doval*, 614 F.3d 1019, 1028 (9th Cir. 2010) (“We hold that a defendant may be found guilty of transportation of illegal aliens resulting in death *only if* the Government proves beyond a reasonable doubt that the defendant’s conduct was the proximate cause of the charged deaths.”); *United States v. Marler*, 756 F.2d 206, 215–16 (1st Cir. 1985) (finding that the statutory requirement that “*death results*” is met where the defendant’s violation of the statute is the legal cause of the victim’s death); *United States v. Harris*, 701 F.2d 1095, 1101 (4th Cir. 1983) (same); *United States v. Guillette*, 547 F.2d 743, 749 (2d Cir. 1976) (same).

2. Section 2L1.1 of the Guidelines

Section 2L1.1 of the U.S. Sentencing Guidelines specifies the appropriate levels of enhancement (or reduction) for defendants convicted of “Alien Smuggling” under 8 U.S.C. § 1324.¹²⁸ Section 2L1.1 provides a base level of twelve for a defendant convicted of smuggling an illegal migrant.¹²⁹ This level is then increased (or decreased) according to the presence or absence of “Specific Offense Characteristics.”¹³⁰

Initially, death resulting from an immigration offense could be considered as the basis for an upward departure, but the Guidelines did not assign it a level.¹³¹ In 1994, however, Congress amended 8 U.S.C. § 1324 to add an increased maximum punishment where a violation of the statute “resulted in” death.¹³² In 1996, Congress advised the Sentencing Commission to issue new enhancements to address the smuggling, transporting, harboring, or inducing of “aliens” in violation of 8 U.S.C. § 1324.¹³³ Congress specifically directed the Commission to provide for a sentence enhancement when an individual dies during the commission of the offense if, “in the course of committing” the offense, the defendant “murders or otherwise causes [the] death . . . [of] an individual.”¹³⁴ Section 2L1.1(b)(7) is the product of this congressional directive.¹³⁵

Of particular importance to this Note are sections 2L1.1(b)(6) and 2L1.1(b)(7) of the Guidelines. Section 2L1.1(b)(6) provides for a two-level increase if the defendant intentionally or recklessly created a substantial risk of serious bodily injury or death.¹³⁶ The Guidelines define “serious bodily injury” as an “injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation.”¹³⁷ In the commentary, the Guidelines provide some¹³⁸ examples of conduct that is considered reckless: carrying significantly more people than the rated capacity of a vehicle allows for,

128. U.S. SENTENCING GUIDELINES MANUAL § 2L1.1 (2010).

129. *Id.* § 2L1.1(a)(3).

130. *Id.* § 2L1.1(b).

131. *See* Pub. L. 103-322, § 60024(1)(G), 108 Stat. 1796 (1994).

132. *See id.*; *see also* 8 U.S.C. § 1324(a)(1)(B)(iv) (2006) (A violation “resulting in the death of any person, [shall] be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.”); *supra* notes 125, 127 and accompanying text.

133. *See* Pub. L. 104-208, § 203(e)(1), 110 Stat. 3009-566 (1996).

134. *Id.*

135. *See* U.S. SENTENCING GUIDELINES MANUAL app. C (1997).

136. U.S. SENTENCING GUIDELINES MANUAL. § 2L1.1(b)(6) (2010) (“If the offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, increase by 2 levels, but if the resulting offense level is less than level 18, increase to level 18.”).

137. *Id.* § 1B1.1 cmt. n.1(L).

138. *See, e.g.*, *United States v. Aranda-Flores*, 450 F.3d 1141, 1144 (10th Cir. 2006) (“[T]he commentary’s examples do not foreclose the enhancement’s application to other dangerous conditions.”); *United States v. Garcia-Guerrero*, 313 F.3d 892, 896 (5th Cir. 2002) (affirming a section 2L1.1(b)(6) sentence enhancement although the defendant’s reckless conduct was not specified in the examples listed by the commentary).

transporting migrants in an engine compartment or trunk, or harboring people in dangerous or inhumane conditions.¹³⁹ In addition, there is an extensive body of case law interpreting what constitutes a reckless or intentional creation of serious bodily injury or death within the meaning of section 2L1.1(b)(6).¹⁴⁰

Section 2L1.1(b)(7) provides for an increase according to the seriousness of the injury where any person died or suffered bodily injury.¹⁴¹ More specifically, section 2L1.1(b)(7) includes a chart with the degree of injury and the corresponding increase in level: (a) bodily injury adds two levels; (b) serious bodily injury adds four levels; (c) permanent or life-threatening bodily injury adds six levels; and (d) death adds ten levels.¹⁴² But while section 2L1.1(b)(6) focuses on the defendant's conduct in relation to the creation of risk,¹⁴³ section 2L1.1(b)(7) is silent as to the issue of causation.¹⁴⁴

The Guidelines specify that all enhancements are to be determined in accordance with section 1B1.3's "Relevant Conduct" application principle.¹⁴⁵ Section 1B1.3 provides that specific offense characteristics are to be determined based on all acts and omissions committed, aided, induced, or procured by the defendant, as well as all the harm that resulted from these acts and omissions.¹⁴⁶ These requirements determine the Guideline range. Accordingly, the section 1B1.3 "Relevant Conduct" provision serves as a framework through which all of the substantive Guidelines, including

139. See U.S.S.G. § 2L1.1 cmt. n.5.

140. See, e.g., *United States v. Munoz-Tello*, 531 F.3d 1174, 1183–84 (10th Cir. 2008) ("Our [§ 2L1.1(b)(6)] inquiry essentially equates to a totality of the circumstances test. . . . Although the commentary . . . suggests some flexibility . . . [(b)(6)] does have bounds. . . . [W]e have stated that 'reckless conduct, in the criminal context, is considered a form of intentional conduct because it includes an element of deliberateness—a *conscious* acceptance of a known, serious risk.' (quoting *United States v. Serawop*, 410 F.3d 656, 663 n.4 (10th Cir. 2005)). Reckless conduct therefore 'necessarily excludes conduct which is merely negligent.' (quoting *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1238 (10th Cir. 1999)). Moreover, we must disregard the 'baseline risk . . . inherent in all vehicular travel,' delving instead into whether the defendant's conduct or his chosen method of transportation 'increased the risk of an accident' and whether the method of transportation exacerbated the risk of death or injury in the event of an accident." (quoting *United States v. Torres-Flores*, 502 F.3d 885, 889–90 (10th Cir. 2007)); *United States v. Zuniga-Amezquita*, 468 F.3d 886, 889 (5th Cir. 2006) ("Despite the fact that a single, bright-line test is not necessarily appropriate for a guideline that must be applied to a wide variety of factual settings, we have articulated five factors to consider when applying [section 2L1.1(b)(6)]: the availability of oxygen, exposure to temperature extremes, the aliens' ability to communicate with the driver of the vehicle, their ability to exit the vehicle quickly, and the danger to them if an accident occurs."); *United States v. Rodriguez-Lopez*, 363 F.3d 1134, 1138 (11th Cir. 2004) (holding that a section 2L1.1(b)(6) enhancement applies "broadly to circumstances where alien smugglers subject others to 'crowded, dangerous, or inhumane conditions'" (quoting U.S.S.G. § 2L1.1 cmt. n.5)).

141. U.S.S.G. § 2L1.1(b)(7) ("If any person died or sustained serious bodily injury, increase the offense level according to the seriousness of the injury.").

142. *Id.*

143. See *id.* § 2L1.1(b)(6); see also *supra* notes 136–39 and accompanying text.

144. See U.S.S.G. § 2L1.1(b)(7).

145. See *id.* § 1B1.3.

146. See *id.* §§ 1B1.3(a)(1)(A), 1B1.3(a)(3).

section 2L1.1(b)(7), must be read. Therefore, in order to apply an enhancement where “any person died or sustained bodily injury,”¹⁴⁷ there must have been some act or omission by the defendant that *resulted* in the harm.¹⁴⁸

D. The Role of the Court in Interpreting the Guidelines

In *Braxton v. United States*,¹⁴⁹ the Supreme Court concluded that Congress empowered the Sentencing Commission to address issues regarding interpretation of the Guidelines.¹⁵⁰ The Court found that Congress intended splits over interpretation of the Guidelines to be resolved through the Commission’s amendment power.¹⁵¹ Congress’s vision of guideline writing as an evolutionary process supports this conclusion.¹⁵² Congress not only expected but also intended for the Commission to continue its research and analysis, anticipating that this would lead to ongoing revisions of the Guidelines through the amendment process.¹⁵³ As the Court reasoned in *Gall*, “[E]ven though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”¹⁵⁴

At the same time, the Court’s decision in *Kimbrough* serves as a reminder that the Guidelines are not perfect.¹⁵⁵ A sentencing court does not have to conform to Guidelines with which it reasonably disagrees;¹⁵⁶ nor is the sentencing court required to wait for the Sentencing Commission to amend the Guidelines before adjusting a sentence on its own.¹⁵⁷ Rather, the sentencing court can make a conscious decision to depart from the advisory Guidelines based on policy disagreements.¹⁵⁸ Because *Braxton* was decided prior to the Court’s decision in *Booker*,¹⁵⁹ it is unclear how current splits over the interpretation of the Guidelines are to be resolved. Thus,

147. *Id.* § 2L1.1(b)(7).

148. *See id.* § 1B1.3(a)(3).

149. 500 U.S. 344 (1991).

150. *See id.* at 348 (“Congress necessarily contemplated that the Commission would periodically review the work of the courts.”).

151. *See id.*; Black, *supra* note 68, at 637.

152. *See supra* notes 84–85 and accompanying text.

153. *See supra* note 86 and accompanying text.

154. *Gall v. United States*, 552 U.S. 38, 46 (2007).

155. *See Kimbrough v. United States*, 552 U.S. 85, 106 (2007) (noting the “exorbitance” of the sentencing disparity created by the Guideline at issue). The Guidelines may, in some instances, fail to reflect properly the statutory considerations imposed by 18 U.S.C. § 3553. *See id.* at 111.

156. *See id.* at 111.

157. *See id.* at 109 (“[I]n the ordinary case, the Commission’s recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.’ The sentencing judge, on the other hand, has ‘greater familiarity with . . . the individual case and the individual defendant before him than the Commission’” (quoting *Rita v. United States*, 551 U.S. 338, 350, 357–58 (2007))).

158. *See id.* at 101.

159. The Supreme Court decided *United States v. Braxton*, 500 U.S. 344 (1991), fourteen years before its decision in *United States v. Booker*, 543 U.S. 220 (2005).

section 2L1.1(b)(7) presents two problems: (1) how the causation issue should be resolved, and (2) who should resolve the conflicting interpretations.

II. WHETHER SECTION 2L1.1(B)(7) REQUIRES A CAUSAL CONNECTION TO SECTION 2L1.1(B)(6)

There is a pervasive tension underlying the nuanced and often incongruous interpretations of different circuits regarding what, if any, causal connection is required between the defendant's conduct and the resulting injury or harm in order for a section 2L1.1(b)(7) sentence enhancement to apply. Circuits are split over whether application of section 2L1.1(b)(7) is predicated on a finding that section 2L1.1(b)(6) applies. Must the defendant have recklessly or intentionally created the harm that results in bodily injury or death? Or is it sufficient that the injury or death occurred during the crime of smuggling, even if only a matter of coincidence?

The court in *United States v. Garcia-Guerrero*¹⁶⁰ declined to resolve this issue, but noted that the question of "whether a causal link between the substantially risky conduct (addressed under [section 2L1.1(b)(6)]) and the death of an individual (addressed under [section 2L1.1(b)(7)]) must exist for an enhancement under section 2L1.1(b)(7)" remained unresolved.¹⁶¹ The Eighth and Ninth Circuits have interpreted section 2L1.1(b)(7) as being predicated on an application of section 2L1.1(b)(6).¹⁶² In other words, the harm for which the defendant is being punished under section 2L1.1(b)(7) must be linked causally to the defendant's risky conduct, as defined by section 2L1.1(b)(6). On the other hand, the Fifth and Tenth Circuits have rejected this argument.¹⁶³ They require only that the injury or death occur during the crime of smuggling or transportation of illegal immigrants. The harm need not be connected to the risky conduct; a defendant who uses due care may nevertheless be subject to a section 2L1.1(b)(7) enhancement where any injury or death occurs.

A. Circuits that Only Will Apply a Section 2L1.1(b)(7) Enhancement Where the Defendant First Is Subject to a Section 2L1.1(b)(6) Enhancement

1. The Eighth Circuit: *United States v. Flores-Flores*

In *United States v. Flores-Flores*,¹⁶⁴ the defendant was convicted of transporting undocumented immigrants.¹⁶⁵ Flores-Flores was hired to drive eleven illegal immigrants from Arizona to Michigan.¹⁶⁶ He attempted to transport the immigrants in a van with only four seats, requiring the

160. 313 F.3d 892 (5th Cir. 2002).

161. *Id.* at 899.

162. *See infra* Part II.A.

163. *See infra* Part II.B.

164. 356 F.3d 861 (8th Cir. 2004).

165. *See id.* at 862.

166. *Id.*

remaining eight immigrants to sit on the vehicle's floor.¹⁶⁷ While en route, Flores-Flores told one of the immigrants in the van, Ramirez-Ortiz, to take over driving.¹⁶⁸ Ramirez-Ortiz fell asleep at the wheel and the van crashed, killing two of the passengers who were sitting on the floor.¹⁶⁹ Based on the two deaths, the district court applied the section 2L1.1(b)(7)¹⁷⁰ sentence enhancement.¹⁷¹ Flores-Flores appealed, arguing that the sentencing enhancement should not have been applied because it was the driver's negligent act of falling asleep that caused the deaths.¹⁷²

The Eight Circuit denied Flores-Flores's appeal, finding that Flores-Flores's unlawful conduct caused the deaths.¹⁷³ Moreover, the court set forth a causation requirement for application of a section 2L1.1(b)(7) enhancement: "[T]he death or injury specified in [section 2L1.1(b)(7)] must be causally connected to the dangerous conditions created by the unlawful conduct."¹⁷⁴

The court found that the deaths were causally connected to the dangerous conditions created by the defendant: the overloaded van, lack of seatbelts, and passengers seated in an open area.¹⁷⁵ Accordingly, the court held that application of a section 2L1.1(b)(7) enhancement was proper because Flores-Flores "recklessly created a substantial risk of death or serious bodily injury to another person within the meaning of [section 2L1.1(b)(6)]," and the deaths of the two passengers were "causally connected to [those] dangerous conditions."¹⁷⁶ Thus, the Eighth Circuit required a causal connection between sections 2L1.1(b)(6) and 2L1.1(b)(7).

2. The Ninth Circuit: *United States v. Herrera-Rojas* and *United States v. Rodriguez-Cruz*

In *United States v. Herrera-Rojas*,¹⁷⁷ the court explained that it assumed "that for [section 2L1.1(b)(7)] to apply, the relevant death or injury must be causally connected to the dangerous conditions created by the unlawful conduct."¹⁷⁸ In this case, the defendant led a group of illegal immigrants

167. *See id.*

168. *See id.*

169. *See id.*

170. In 2004, when the Eight Circuit decided *Flores-Flores*, the Sentencing Guidelines codified what is now (b)(7) as (b)(6).

171. *See Flores-Flores*, 356 F.3d at 862.

172. *See id.*

173. *See id.* at 863.

174. *Id.*

175. *See id.* at 862–63.

176. *Id.* at 863. The term "reckless" refers to "a situation in which the defendant was aware of the risk created by his conduct and the risk was of such a nature and degree that to disregard that risk constituted a gross deviation from the standard care that a reasonable person would exercise in such a situation." U.S. SENTENCING GUIDELINES MANUAL § 2A1.4 cmt. n.1 (2010).

177. 243 F.3d 1139 (9th Cir. 2001).

178. *Id.* at 1144 n.1. The Ninth Circuit again referred to this assumption in its *United States v. Ramirez-Lopez* opinion, noting that the Ninth Circuit "has suggested that a mens rea of recklessness is required to impose an enhancement under section [2L1.1(b)(7)]." 315 F.3d 1143, 1159 (9th Cir. 2002).

through brush for several days in cold, wet weather.¹⁷⁹ When one member became too weak to continue, the defendant left him behind to die alone.¹⁸⁰

The *Herrera-Rojas* court found that the death was “causally connected to the dangerous conditions created by the unlawful conduct.”¹⁸¹ Accordingly, the court affirmed the both the section 2L1.1(b)(6) and section 2L1.1(b)(7) enhancements. In response, the defendant argued that an application of both enhancements constitutes “[i]mpermissible double counting,” because the risk of death penalized by section 2L1.1(b)(6) is a “necessary element” of the death penalized by section 2L1.1(b)(7).¹⁸² The *Herrera-Rojas* court rejected this argument.¹⁸³ It explained that “[i]mpermissible double counting ‘occurs where one part of the Guidelines is applied to increase a defendant’s punishment on account of a kind of harm that has already been fully accounted for by the application of another part of the Guidelines,’”¹⁸⁴ or where “‘the same conduct on the part of the defendant is used to support separate increases under separate enhancement provisions which necessarily overlap, are indistinct, and serve identical purposes.’”¹⁸⁵ Turning to the section 2L1.1(b)(6) and 2L1.1(b)(7) enhancements, the court concluded that the application of both does *not* constitute impermissible double counting.¹⁸⁶ The court held that “[i]t is not double counting to impose two increases based on the same conduct when ‘one increase focuses solely on the defendant’s conduct and the other increase focuses on the nature and degree of harm caused by the defendant’s conduct.’”¹⁸⁷ According to the Ninth Circuit, section 2L1.1(b)(7) punishes the harm while section 2L1.1(b)(6) focuses solely on the conduct; therefore, no double counting exists and both enhancements should apply in cases like *Herrera-Rojas*.¹⁸⁸

Several months later, the Ninth Circuit again addressed the connection between sections 2L1.1(b)(6) and 2L1.1(b)(7) in *United States v. Rodriguez-Cruz*.¹⁸⁹ The court in *Rodriguez-Cruz* affirmed sentence enhancements under both sections 2L1.1(b)(6) and 2L1.1(b)(7).¹⁹⁰ The court found that a section 2L1.1(b)(6) enhancement was proper where the defendants recklessly smuggled immigrants through treacherous mountain and canyon terrain,¹⁹¹ despite the fact that they “were obviously woefully under-equipped for the potential hazards that were known [to the defendants] prior to departure.”¹⁹² The court then affirmed the district

179. *See Herrera-Rojas*, 243 F.3d at 1141.

180. *See id.*

181. *See id.* at 1144 n.1.

182. *Id.* at 1144.

183. *See id.* at 1144–45.

184. *Id.* (quoting *United States v. Archdale*, 229 F.3d 861, 869 (9th Cir. 2000)).

185. *Id.* (quoting *United States v. Fisher*, 132 F.3d 1327, 1329 (10th Cir. 1997)).

186. *See id.*

187. *Id.* (quoting *United States v. Perkins*, 89 F.3d 303, 310 (6th Cir. 1996)).

188. *See id.*

189. 255 F.3d 1054 (9th Cir. 2001).

190. *See id.* at 1056.

191. *See id.* at 1059.

192. *Id.* at 1056.

court's section 2L1.1(b)(7) enhancement for the death (due to hypothermia) of one of the immigrants whom the defendants had left behind.¹⁹³ In affirming, the Ninth Circuit held that "[o]nce the enhancement was warranted for recklessly creating the risk, it was proper for the district court automatically to impose the additional enhancement for death that resulted from that risk."¹⁹⁴ The court addressed the connection between sections 2L1.1(b)(6) and 2L1.1(b)(7), explaining that "[b]ecause [the defendants] were subject to [section 2L1.1(b)(6)] for recklessly creating the risk, an additional . . . increase was required by [section 2L1.1(b)(7)] for the death that resulted from that risk."¹⁹⁵

B. Circuits that Do Not Predicate Application of Section 2L1.1(b)(7) on a Section 2L1.1(b)(6) Enhancement

1. The Fifth Circuit: *United States v. Gomez-Cortez*

In *United States v. Gomez-Cortez*,¹⁹⁶ the Fifth Circuit found that section 2L1.1(b)(7) does *not* require a causal connection to section 2L1.1(b)(6).¹⁹⁷ The defendant, Gomez, was involved in a smuggling operation.¹⁹⁸ When Gomez picked up one of the immigrants whom she was transporting within Texas, one of her co-conspirators warned Gomez that the immigrant "looked ill."¹⁹⁹ Gomez decided to transport the sick immigrant anyway, placing him in the passenger seat for the entirety of their journey.²⁰⁰ Both arrived safely at their destination, where the defendant then passed the immigrant onto another conspirator for transportation to Houston.²⁰¹ Later, however, the immigrant died en route to Houston.

The district court held that the defendant had recklessly created a substantial risk of death or serious bodily injury by transporting the ill immigrant.²⁰² But the Fifth Circuit rejected this finding, holding that the defendant had *not* subjected the immigrant being smuggled to "a real risk of serious bodily injury."²⁰³ The court concluded that the defendant had not created the type of risk that section 2L1.1(b)(6) was intended to prohibit.²⁰⁴

193. *See id.*

194. *Id.*

195. *Id.* at 1059.

196. No. 01-40512, 2002 WL 496419 (5th Cir. Mar. 22, 2002).

197. *See id.* at *3–4 (affirming the district court's application of § 2L1.1(b)(7) despite concluding that the district court had erred in applying a (b)(6) enhancement to the defendant's sentence).

198. *See id.* at *1.

199. *Id.*

200. *See id.*

201. *See id.*

202. *Id.* at *2.

203. *Id.* at *3.

204. *See id.* In this case, the defendant transported the unauthorized immigrant in the passenger seat of a car; though the immigrant was ill, his health did not prevent him from traveling. *See id.*

Nevertheless, the court affirmed the section 2L1.1(b)(7) enhancement for the death of the immigrant.²⁰⁵ Despite the fact that the defendant had neither intentionally nor recklessly created a substantial risk of serious bodily injury or death within the meaning of section 2L1.1(b)(6), the court found that a sentence enhancement under section 2L1.1(b)(7) was proper solely on the basis that there was a preponderance of the evidence to show that the immigrant died while he was being smuggled.²⁰⁶ Thus, the Fifth Circuit implicitly repudiated the notion that section 2L1.1(b)(7) is dependent upon a determination that 2L1.1(b)(6) applies.

2. The Tenth Circuit: *United States v. Aranda-Flores* and *United States v. Perez-Amaro*

Like the Fifth Circuit, the Tenth Circuit affirmed the application of a section 2L1.1(b)(7) enhancement despite finding that a section 2L1.1(b)(6) enhancement was unwarranted.²⁰⁷ In *United States v. Aranda-Flores*, the defendant pled guilty to transporting illegal aliens from Phoenix, Arizona to Utah.²⁰⁸ The defendant was the sole driver during an eight-and-a-half hour trip where he traveled at night, taking remote highway roads to avoid detection.²⁰⁹ The defendant fell asleep at the wheel, colliding with oncoming traffic.²¹⁰ Four of the passengers were taken to the hospital for medical care, where one later died.²¹¹ The court concluded that there was “nothing unlawful, let alone inherently dangerous, about driving on a two-lane highway at night for eight-and-a-half hours with one break.”²¹² Therefore, the court overturned the district court’s application of the section 2L1.1(b)(6) enhancement, concluding that the defendant’s conduct “did not recklessly create a substantial risk of death or serious bodily injury.”²¹³ The court let the section 2L1.1(b)(7) enhancement stand, however.²¹⁴

In *United States v. Perez-Amaro*,²¹⁵ the Tenth Circuit again held that a section 2L1.1(b)(7) enhancement was proper, despite finding that a section 2L1.1(b)(6) enhancement was inapplicable.²¹⁶ The *Perez-Amaro* court affirmed the district court’s decision that the defendant did *not* recklessly create a risk of injury or death where he was driving a van equipped with seatbelts and enough seats, and the accident was caused by icy road

205. *See id.* at *4.

206. *See id.* In fact, the pre-sentence report stated that it was unclear whether the defendants even “caused the death, or whether their negligence”—let alone recklessness—“contributed to the death.” *Id.* at *1.

207. *See United States v. Aranda-Flores*, 450 F.3d 1141, 1146 (10th Cir. 2006).

208. *Id.* at 1142.

209. *Id.* at 1142–43.

210. *See id.* at 1142.

211. *See id.*

212. *Id.* at 1146.

213. *Id.*

214. *See id.*

215. 91 F. App’x 649 (10th Cir. 2004).

216. *See id.* at 650, 652 (affirming the district court’s application of a (b)(7) enhancement despite finding that a (b)(6) increase was inapplicable).

conditions rather than reckless driving.²¹⁷ Nevertheless, the court affirmed the section 2L1.1(b)(7) sentence enhancement because four passengers were injured in the accident.²¹⁸ In doing so, the court rejected an interpretation of section 2L1.1(b)(7) that would require the injury or death to be connected causally to the defendant's creation of risk under section 2L1.1(b)(6).

In conclusion, circuits are fragmented in their discordant conclusions as to whether application of section 2L1.1(b)(7) is predicated on a finding that section 2L1.1(b)(6) applies. Thus, the question remains unresolved: what, if any, causal connection does section 2L1.1(b)(7) require between the defendant's conduct and the resulting harm?

III. EMBRACING THE PRINCIPLES OF PROPORTIONALITY AND DETERRENCE: WHY A SECTION 2L1.1(B)(7) ENHANCEMENT SHOULD BE PREDICATED ON A CAUSAL CONNECTION TO SECTION 2L1.1(B)(6)

In Part III.A, this Note contends that the Guidelines do *not* predicate a section 2L1.1(b)(7) enhancement on a finding that section 2L1.1(b)(6) applies. In Part III.B, however, this Note argues that a sentence enhancement for any death or injury *should* be dependent on a finding that the defendant recklessly or intentionally subjected those whom he was smuggling to the risk of serious injury or death. This solution would be the fairest punishment scheme and the most effective method of deterring more dangerous conduct.

A. A Critical Analysis of Section 2L1.1(b)(7): Which Interpretation Is More Faithful to the Guidelines?

Although this Note argues that a section 2L1.1(b)(7) enhancement should be contingent upon a finding that the defendant's reckless or intentional creation of risk caused the injury or death, this causal requirement does not exist in the Guideline as it stands currently.²¹⁹ In fact, section 2L1.1(b)(7) itself contains no causation requirement.²²⁰ Rather, applying section 1B1.3's "Relevant Conduct" provision, section 2L1.1(b)(7) requires only a loose relationship between the defendant's overall conduct and the resulting harm.²²¹

1. Section 2L1.1(b)(7) Does *Not* Require that the Defendant Recklessly or Intentionally Created a Substantial Risk of Harm

As discussed in Part II, circuits are split as to whether a section 2L1.1(b)(7) enhancement first requires a finding under section 2L1.1(b)(6) that the defendant recklessly or intentionally created a risk of serious bodily injury or death.

217. *See id.* at 650–51.

218. *See id.* at 651–52.

219. *See infra* Part III.A.1–2.

220. *See infra* Part III.A.1.

221. *See infra* Part III.A.2.

Section 1B1.1(b) of the Guidelines requires the sentencing court to determine the base offense level and apply the appropriate specific offense characteristics *in the order listed*.²²² But while this provision directs the order in which the specific offense characteristics are to be applied, there is *no* requirement—express or implied—that the application of a latter enhancement is predicated on application of the offense characteristics that come before it.²²³

In support of this conclusion is the fact that no court has found that application of the section 2L1.1(b)(7) enhancement is predicated on application of the five specific offense characteristics before it. For instance, there is no requirement that the offense be committed for profit, or involve over six aliens, or that the defendant be a convicted felon in order to apply a section 2L1.1(b)(7) enhancement, just as a section 2L1.1(b)(6) enhancement for recklessly creating a risk of bodily injury is not predicated on a determination under section 2L1.1(b)(5) that the offense involve the use of a firearm.²²⁴ The logical conclusion is that, absent directions otherwise, the application of one specific offense characteristic is *not* dependent on application of the offense characteristics that precede it.

The plain language of section 2L1.1(b)(7) concerns only outcome—the death or injury of any person—without regard to the defendant’s intent or recklessness.²²⁵ The language of section 2L1.1(b)(6), on the other hand, is focused strictly on conduct—whether or not the defendant acted recklessly or intentionally in creating a substantial risk of harm—with no regard for the outcome.²²⁶ Moreover, there are neither special instructions nor commentary²²⁷ to provide any textual support for the argument that section 2L1.1(b)(6) must be applied in order to enhance a sentence under section 2L1.1(b)(7).

2. The Guidelines Require Only a Loose Connection Between the Criminal Conduct and the Resulting Harm

All that section 2L1.1(b)(7) requires for an enhancement is that “any person died or sustained bodily injury.”²²⁸ The section provides for an increase for the actual harm caused, without any consideration of the defendant’s intentional or reckless conduct.²²⁹ Nothing in the plain language of section 2L1.1(b)(7) requires the death to be causally connected to the offense.²³⁰

222. See *supra* note 73 and accompanying text.

223. See *supra* note 75 and accompanying text.

224. See generally U.S. SENTENCING GUIDELINES MANUAL § 2L1.1 cmt. application notes (2010) (making no mention of any requirement that latter enhancements are dependent upon findings of the specific offense characteristics that precede them).

225. See *supra* note 188 and accompanying text.

226. See *supra* notes 141–44 and accompanying text.

227. See U.S.S.G. § 2L1.1; see also *supra* note 74 and accompanying text.

228. U.S.S.G. § 2L1.1(b)(7).

229. See *supra* notes 141–44 and accompanying text.

230. See U.S.S.G. § 2L1.1(b)(7).

The Guidelines specify, however, that all enhancements—including those under section 2L1.1—are to be determined in accordance with section 1B1.3’s “Relevant Conduct” application principle.²³¹ In order to apply a section 2L1.1(b)(7) enhancement, there must have been some act or omission by the defendant that *resulted* in the harm.²³² This causation standard is, at best, murky and indefinite.²³³ There is no requirement that the defendant act recklessly or intentionally—or even that the resulting harm was reasonably foreseeable to the defendant.²³⁴ Therefore, while section 1B1.3 requires *some* causal connection to the overall criminal activity, it is sufficient that the crime played any part in bringing about the result—however attenuated that connection might be.

B. The Sentencing Commission Should Amend 2L1.1(b)(7) to Apply Only Where the Resulting Harm Is Causally Connected to the Defendant’s Reckless or Intentional Creation of Substantial Risk

1. Section 2L1.1(b)(7) Only Should Apply to Those Defendants who Have Intentionally or Recklessly Created a Substantial Risk of Death or Serious Bodily Injury

Section 2L1.1(b)(7) should be amended to require a finding that the defendant first meets the criteria under section 2L1.1(b)(6). As this Note has discussed, a number of courts already have imposed the requirement that a section 2L1.1(b)(6) application must apply in order to impose a sentence enhancement under section 2L1.1(b)(7).²³⁵ But this is a judicial construction; the Guidelines themselves do not mandate such a rule.²³⁶

231. See *supra* note 145 and accompanying text.

232. See *supra* notes 146–48 and accompanying text.

233. Courts also have answered differently the question of whether section 2L1.1(b)(7) imposes a proximate causation requirement. In *United States v. Flores-Flores*, the court did not hold explicitly that a defendant must be the proximate cause, but invoked language of proximate causation by concluding that a section 2L1.1(b)(7) enhancement was proper where a migrant’s negligence “was not an intervening cause relieving [the defendant] of responsibility for the aliens’ deaths.” 356 F.3d 861, 863 (8th Cir. 2004); see also *United States v. Zaldivar*, 615 F.3d 1346, 1350–51 (11th Cir. 2010) (upholding a section 2L1.1(b)(7) enhancement where the defendant’s co-conspirator was the proximate cause of the victim’s death and the actions of the co-conspirator were “reasonably foreseeable”). In contrast, the court in *United States v. Cardena-Garcia* held that “proof of direct or proximate cause” is not required to impose a section 2L1.1(b)(7) enhancement where a defendant pleads guilty to transporting illegal immigrants resulting in death and, in fact, section 2L1.1(b)(7) “contains no causation requirement.” 362 F.3d 663, 665–66 (10th Cir. 2004). But despite the *Cardena-Garcia* court’s holding in respect to the particular defendant, who had pleaded guilty to smuggling resulting in death, the court *did* entertain the idea that a causal nexus might be required for a defendant who pleads guilty to a lesser offense, stating that “[a] sufficient nexus would exist if the death or injury was reasonably foreseeable and [the defendant’s] conduct was a contributing factor.” *Id.* at 666.

234. See U.S.S.G. § 1B1.3(a)(1)(B). Where a defendant is being held liable for the acts of his co-conspirators, however, accomplice liability is premised on the reasonable foreseeability of the resulting harm. *Id.*

235. See *supra* Part II.A.

236. See *supra* Part III.A.1–2.

Instead, the Guidelines should make the causal requirement clear and easily applicable. There is a plethora of substantive precedent regarding exactly what types of conditions pose a “substantial risk of death or bodily injury.”²³⁷ Accordingly, under the causation standard that this Note suggests, a sentencing judge who has determined that the defendant recklessly or intentionally subjected the victim to a substantial risk of harm under section 2L1.1(b)(6) will then apply section 2L1.1(b)(7) if the death that resulted was of the type of risk which the court found the defendant to have intentionally or recklessly created. Moreover, this test will better align with the goals of retribution and deterrence.²³⁸

2. Section 2L1.1(b)(7) Should Reflect Its Congressional Mandate

When Congress directed the Commission to write new enhancements, it provided the Commission with specific instructions to enhance sentences where, “in the course of committing” the offense, the defendant “murders or otherwise *causes* [the] death” of a person.²³⁹ In contrast, the Guidelines currently require only a lax connection between the criminal conduct and the resulting harm.²⁴⁰ Although Congress delegated broad authority to the Sentencing Commission,²⁴¹ the Commission remains subject to Congress’s power and its will.²⁴² Therefore, the Commission should follow Congress’s objective by directing that an enhancement for death apply where the defendant “causes” the injury or death. More specifically, section 2L1.1(b)(7) only should apply where the defendant creates a “substantial risk of harm” that causes the injury or death, not where the injury or death merely coincides—or is nebulously connected—with the criminal conduct.

3. Section 2L1.1(b)(7) Should Better Align with the Goals of 18 U.S.C. § 3353(a)

Imposing a stricter causation requirement would be more in line with the purposes of 18 U.S.C. § 3353(a)(2).²⁴³ According to the text of section 2L1.1(b)(7), read in conjunction with section 1B1.3, the resulting harm only needs to be *somehow* connected to the overall criminal activity. As a result, the relatively loose causation requirement fails to achieve as effectively as possible the sentencing objectives of deterrence and just punishment.²⁴⁴ In particular, the current guideline fails to satisfy § 3353(a)(2)’s goal of “reflect[ing] the seriousness of the offense,” and “provid[ing] just punishment for the offense.”²⁴⁵ Furthermore, section 2L1.1(b)(7) would deter more effectively the riskier, more culpable conduct if it contained a

237. See *supra* note 140 and accompanying text.

238. See *supra* note 67 and accompanying text.

239. See *supra* note 134 and accompanying text.

240. See *supra* Part III.A.2.

241. 28 U.S.C. § 994 (2006); U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 (2010).

242. See 28 U.S.C. § 994(p).

243. See *supra* note 67 and accompanying text.

244. See U.S.S.G. § 1A1.2.

245. 18 U.S.C. § 3553(a)(2)(A) (2006).

more stringent causation requirement, thereby promoting § 3353(a)(2)'s additional goal of “afford[ing] adequate deterrence to criminal conduct.”²⁴⁶

First, the standard for which this Note advocates will serve a retributive function by punishing those defendants whose reckless or intentional behavior has resulted in injury or death, while avoiding the imposition of a section 2L1.1(b)(7) enhancement for defendants who have taken proper care and precautions. As it currently stands, section 2L1.1(b)(7) fails to distinguish between those defendants who are more culpable than others.

For example, an individual providing transportation to a group of illegal immigrants, whose sole purpose is to help on humanitarian grounds, could be subject to a greater sentence if an immigrant is somehow injured (for instance, if the individual negligently administers medical aid to the migrant, resulting in a deadly infection) than a commercial smuggler who intentionally subjects immigrants to life-threatening conditions (e.g., packing several migrants into a poorly ventilated car trunk and speeding along the highway), but by a stroke of luck does not harm anyone.²⁴⁷

Perhaps more important, this change will give smugglers an incentive to take greater care. “Knowing the degree of punishment may . . . [persuade smugglers] to act more responsibly in carrying through on their services.”²⁴⁸ Smugglers will be on notice that if they have recklessly or intentionally created a substantial risk of injury or death, they will be subject to a sentence enhancement if any harm results from the risk. The possibility of apprehension and varying degrees of criminal liability are factors that smugglers consider in planning crossings.²⁴⁹ It follows that some smugglers, faced with the cost of a potential increase in liability, will elect to act more responsibly—or at least less recklessly.

Under the causation standard this Note proposes, a defendant subject to a section 2L1.1(b)(6) enhancement for transporting a migrant in a crowded vehicle without seatbelts would not be subject to a section 2L1.1(b)(7) enhancement if the migrant dies of an unrelated underlying illness, as the death was not the type to which the defendant recklessly exposed the migrant. If, however, the defendant creates a situation of substantial risk of injury or death, and such harm does result, the enhancement will apply as long as the death is causally connected to the behavior for which the defendant has been held responsible under section 2L1.1(b)(6).

246. 18 U.S.C. § 3353(a)(2)(B).

247. The human rights worker's negligence would be sufficient cause under section 2L1.1(b)(7) to enhance the sentence by ten levels. By contrast, the reckless commercial smuggler would only be subject to a six-level increase for intentionally creating a substantial risk of serious bodily injury or death.

248. *Subcomm. on Immigration, Border Sec., & Claims, supra* note 9, at 31 (statement of Maria Jiminez).

249. *See supra* notes 46–47 and accompanying text; *see also* Spener, *supra* note 47, at 9 (explaining that coyote fees have risen so sharply “because of the greater risk of arrest and lengthy imprisonment that coyotes [are] facing”). Therefore, even if it costs more to adequately equip migrants and use care in smuggling them, smugglers who take care would remain competitive because their less careful competitors would face greater liability and longer potential imprisonment.

Studies show that even knowledge of the dangers inherent in border crossing does *not* deter immigrants from attempting to enter.²⁵⁰ Instead, the harder it becomes to enter, the higher the prices that smugglers charge for their services.²⁵¹ Therefore, in order to reduce the risk of injury and death, it would be more effective to deter *smugglers* from recklessly or intentionally subjecting migrants to risk of harm.

As section 2L1.1(b)(7) stands now, there is little incentive for smugglers to take greater care with the health and safety of those immigrants whom they are smuggling.²⁵² Therefore, the Guidelines should be amended to distinguish more effectively between those whose reckless (or intentional) behavior causes harm, and those who take precautions to ensure migrants' safety.²⁵³ In other words, this makes sense not only in terms of a retributive objective but also as a mechanism of deterrence. Crimes that are more serious—involving more criminal culpability and a greater overall risk—should be punished more severely than less serious ones. This is in part, as Judge Posner argued recently, “to ensure that criminals are not made indifferent between committing the lesser and the greater crime; if they’re going to commit crimes, at least they should commit the less serious ones.”²⁵⁴

C. Who Is Best Suited to Promulgate a Uniform Interpretation of Section 2L1.1(b)(7)?

1. Why the Sentencing Commission Should Amend the Guidelines

As discussed in Part I.B.2 of this Note, although the Guidelines are no longer mandatory, they continue to play a very important role in federal sentencing.²⁵⁵ District courts are required to calculate the applicable Guidelines' range when sentencing, even in the “advisory” system; an incorrect calculation of the Guidelines is grounds for reversal of the sentence.²⁵⁶ Procedurally, the Guidelines still figure prominently into the

250. See *supra* notes 48–50, 56–61 and accompanying text.

251. See *supra* notes 45–47 and accompanying text.

252. See *supra* note 247 and accompanying text; see also *infra* note 254 and accompanying text.

253. Such an amendment would better align with current proposals for immigration reform. For instance, under the proposed Alien Smuggling and Terrorism Prevention Act, the House of Representatives placed a particular emphasis on the need to enforce aggressively those smugglers who create “unsafe or recklessly dangerous conditions that expose individuals to particularly high risk of injury or death.” See H.R. 2399, 110th Cong. § 2 (2007).

254. *United States v. Hatfield*, 591 F.3d 945, 949 (7th Cir. 2010). For instance, a smuggler guiding migrants through the desert should have a clear incentive to make sure that the migrants are adequately prepared with food, water, etc. However, as the Guidelines now stand, Defendant A, who takes care to equip adequately the migrants he is smuggling could be subject to a higher enhancement than Defendant B, who leads a group without enough food, water, or clothing, if one of Defendant A's migrants happens to suffer from a heart-attack, whereas Defendant B's migrants somehow manage to survive the trek unscathed.

255. See *supra* Part I.B.2.

256. See *supra* notes 107–08.

sentencing process.²⁵⁷ Moreover, the Guidelines remain influential in the cognitive processes of judges.²⁵⁸ Thus, the rhetorical declaration of the Guidelines as advisory “*does not make them so* No matter what the Guidelines are called, they will remain influential.”²⁵⁹

Given that the Guidelines continue to play a significant role in the determination of sentences, they should be amended to require an explicit finding under section 2L1.1(b)(6) that the defendant recklessly or intentionally created a substantial risk of harm before a defendant may be subject to an enhancement for a resulting death or injury under section 2L1.1(b)(7). Not only will this amendment better align with Congress’s goals of providing just punishment and deterrence, it also will achieve the Congressional goal of increased uniformity in sentencing by resolving the fractured split of interpretations regarding the causal connection that section 2L1.1(b)(7) requires.²⁶⁰

2. Out of the Shadow of *Braxton*: Why Courts Should Consider Interceding Post-*Booker*

While the distinction between pre-*Booker* and post-*Booker* sentencing is in many ways more rhetorical than practical,²⁶¹ the Supreme Court’s decision in *Booker* effected a very real transformation in the power of district courts to calculate sentences.²⁶² This is especially true after the Supreme Court’s decision in *United States v. Kimbrough*.²⁶³ Regardless of whether courts choose to exercise this power in practice, a sentencing court *is* allowed to depart from the Guidelines.²⁶⁴ In fact, § 3353 commands sentencing courts to take into account a number of factors; it does not privilege the Guidelines over other considerations.²⁶⁵

Moreover, Congress made it clear in the Sentencing Reform Act that it considered the guideline-writing process to be evolutionary.²⁶⁶ Not only does the Commission possess the power to amend the Guidelines (with Congressional approval), it has the duty to do so.²⁶⁷ The Guidelines are not

257. See *supra* Part I.B.2.

258. See *supra* notes 109–13 and accompanying text.

259. See Gertner, *supra* note 93, at 137.

260. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2010) (“Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”); see also Exum, *supra* note 106, at 150 (arguing that uniformity was the impetus behind the *Booker* Court’s decision to change the Guidelines to an advisory system rather than completely invalidating them).

261. See *supra* Part I.B.2.

262. See *supra* notes 88–90 and accompanying text.

263. 552 U.S. 85 (2007); see *supra* notes 100–02 and accompanying text.

264. See *supra* notes 155–58 and accompanying text.

265. See 18 U.S.C. § 3353(a) (2006); see also *United States v. Gall*, 552 U.S. 38, 49–50 (2007) (“The Guidelines are not the only consideration [T]he district judge should [] consider all of the § 3553(a) factors.”).

266. See *supra* notes 84–86 and accompanying text.

267. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2010) (emphasizing that it is expected “that continuing research, experience, and analysis will result in modifications and revisions to the guidelines,” and thus, “the Commission is established as a permanent agency to monitor sentencing practices”); see also *id.* § 1A2 (“[S]entencing is a dynamic field that

set in stone; they are supposed to adapt to the changing realities of the criminal justice system and reflect the sentencing decisions of the judges within that system.²⁶⁸

While it is no longer mandatory to impose the exact sentence provided by the Guidelines, it *is* mandatory to consider the 18 U.S.C. § 3353 factors in sentencing.²⁶⁹ Thus, it is incumbent upon district courts to sentence according to what they believe is most fair in light of these factors. As this Note argues, a causation standard predicated on a causal connection between the risk recklessly or intentionally created and the resulting harm best reflects the statutory sentencing factors codified in § 3353.²⁷⁰ Sentencing courts must begin with a determination of the sentence advised by the Guidelines.²⁷¹ But when a court finds the Guidelines to require a more lax causation standard, providing for an enhancement even where the defendant has not recklessly or intentionally risked the resulting harm, the courts should make a conscious, informed decision to depart from the Guidelines. In sum, they should require a finding of causation between the defendant's reckless or intentional creation of a substantial risk of serious bodily injury or death and the resulting harm. This causation standard will achieve Congress's sentencing goals of deterrence and just punishment more effectively and accurately.

CONCLUSION

Even post-*Booker*, the Supreme Court is not likely to resolve the interpretational issues of section 2L1.1(b)(7). In fact, because application of the Guidelines is no longer mandatory, the Court is even less likely to rule on this issue than it was at the time of deciding *Braxton*;²⁷² this is because, in theory, district courts are considering the Guidelines (section 2L1.1(b)(7) in this case) as only part of the overall § 3353 analysis.²⁷³ Therefore, there are theoretically fewer constitutional implications of an interpretational split such as the one that currently exists regarding section 2L1.1(b)(7)'s causation requirement.

But as this Note emphasizes, most sentencing decisions are still "anchored" in—and conform to—the Guidelines.²⁷⁴ Consequently, the Commission should amend section 2L1.1(b)(7) to resolve the split and impose a clear causal standard that reflects the sentencing goals of retribution and deterrence. Section 2L1.1(b)(7) should apply only to those defendants who have recklessly or intentionally created a substantial risk of the resulting harm. In the interim, however, rather than focusing solely on

requires continuing review by an expert body to revise sentencing policies, in light of application experience . . . and as more is learned about what motivates and controls criminal behavior.").

268. See *supra* note 86 and accompanying text.

269. See 18 U.S.C. § 3353; see also *Gall*, 552 U.S. at 49–50.

270. See 18 U.S.C. § 3353(a).

271. See *supra* note 98 and accompanying text.

272. *United States v. Braxton*, 500 U.S. 344 (1991).

273. See 18 U.S.C. § 3353.

274. See *supra* notes 109–13 and accompanying text.

what is the correct interpretation of the Guideline as currently written, or waiting for the Sentencing Commission to amend the Guideline, district courts should evaluate independently the fairness and appropriateness of section 2L1.1(b)(7), applying a causation standard that best achieves *all* of 18 U.S.C. § 3553(a)'s factors.²⁷⁵ Moreover, if courts take the initiative to do this, then the empirical analyses of the Sentencing Commission should reflect these evolving judicial norms, and the Guidelines themselves will be amended accordingly.²⁷⁶

275. See 18 U.S.C. § 3553(a).

276. See *supra* note 86 and accompanying text; see also *Braxton*, 500 U.S. at 348 (concluding that Congress intended the Sentencing Commission to “periodically review the work of the courts”).